

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

TRADESMEN INTERNATIONAL, INC.

and

CARPENTERS REGIONAL COUNCIL
OF BALTIMORE & VICINITY

Cases 5-CA-26411
5-CA-26437
5-CA-26687
5-CA-26692
5-CA-27482
5-CA-27927

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 24

Cases 5-CA-26412
5-CA-26965

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 229

Case 5-CA-26465

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 143

Case 5-CA-26466

*Brenda Valentine Harris and
Thomas P. McCarthy, Esqs.,*
for the General Counsel.

Kenneth B. Stark, Esq.,
of Cleveland, Ohio, and
Vincent T. Norwillo, Esq.,
of Solon, Ohio,
for Respondent Tradesmen
International, Inc.

Joel A. Smith, Esq.,
of Baltimore, Maryland,
for Carpenters Regional Council
of Baltimore & Vicinity.

John M. Singleton, Esq.,
of Baltimore, Maryland,
for IBEW Locals 24, 143, 229.

SUPPLEMENTAL DECISION

MARTIN J. LINSKY, Administrative Law Judge: On December 1, 1999 I issued a decision in the above-captioned case after a 20-day hearing and the receipt of briefs. The General Counsel, Charging Party and Respondent filed exceptions to my decision.

On May 11, 2000, the Board issued its decision in *FES (A Division of Thermo Power)*, 331 NLRB No. 20 (2000), setting forth the framework for analysis of refusal-to-hire and refusal-to-consider violations.

On June 7, 2000 the Board remanded the above captioned case, which was pending before the Board, to me. The Remand Order reads, in pertinent part, as follows: "The Board has decided to remand this case to the judge for further consideration in light of *FES*, including, if necessary, reopening the record to obtain evidence required to decide the case under the *FES* framework. Issues to be considered on remand include, but are not limited to, 1) whether, under *FES*, the burden shifted to the Respondent to demonstrate that, absent the discrimination, each of the alleged discriminatees would not have been hired, and particularly whether each of the alleged discriminatee-carpenters was not an experienced drywall mechanic and whether the Respondent would not have hired them for that reason in the absence of the discrimination; 2) whether the Respondent met that burden for each alleged discriminatee; and 3) whether and when, absent the discrimination against them, each discriminatee would have been hired."

On August 7, 2000, I issued an Invitation to File Briefs, attached to this supplemental decision as Appendix A, which invited the parties to file briefs on the remand issues.

In timely filed briefs Counsel for the General Counsel writing for themselves and also expressing the position of Counsel for the Charging Party Electricians oppose, as unnecessary, the reopening of the record in the instant case as does Counsel for the Charging Party Carpenters in his brief. Only the Respondent argues that the record should be reopened for the introduction of additional evidence.

I agree with Counsel for General Counsel, Charging Party Electricians, and Charging Party Carpenters. I find it unnecessary, contrary to Respondent, to reopen the record.

In *FES*, 331 NLRB No. 20, slip op. at 4 (2000), the Board held (footnote omitted):

To establish a discriminatory refusal to hire, the General Counsel must, under the allocation of burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enf'd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), first show the following at the hearing on the merits: (1) that the respondent was hiring . . . (2) that the applications had experience or training relevant to . . . the positions for hire . . . and (3) that antiunion animus contributed to the decision not to hire the applicants. Once this is established, the burden will shift to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation

If the General Counsel meets his burden and the respondent fails to show that it would have made the same hiring decisions even in the absence of union activity or affiliation, then a violation of Section 8(a)(3) has been established. The appropriate remedy for such a violation is a cease-and-desist order, and an order to offer the discriminatees immediate reinstatement to the positions to which they applied or, if those positions no longer exist, to substantially equivalent positions, and to make them whole for losses sustained by reason of the discrimination.

The evidence at hearing was overwhelming that the General Counsel made out a prima facie case in the instant matter and that the burden shifted to Respondent to demonstrate that, absent the discrimination, each of the alleged discriminatees would not have been hired in any event.

Respondent demonstrated at the 20 day hearing and in its post hearing brief that it was aware of its burden to demonstrate that even if discrimination was proven, which they, of course, hotly contested, the discriminatees would not have been hired in any event.

.5 Respondent failed to meet its *Wright Line* burden of showing that it would not have hired the discriminatees even in the absence of their union activity.

10 The evidence was clear that those carpenters and electricians hired by Respondent were not better qualified than the alleged discriminatees I found to have been discriminated against because of their union affiliation. This is particularly true with respect to electrician and carpenter positions. With respect to the drywall mechanic position which is a job that falls within the general carpenter classification Respondent argues that only expert drywall mechanics would be hired for those positions and not just any competent journeyman carpenter like the alleged carpenter discriminatees. However, Respondent, as I noted in my decision, raised this defense later in the litigation making it appear to be pretextual. Further union journeymen carpenters are trained in drywall work and are competent to perform it. In any event even if the carpenter discriminatees were properly denied employment as drywall mechanics because those hired by Respondent had greater expertise in that area than they did there were more than enough carpenter jobs that were filled by Respondent for which all the carpenter discriminatees were clearly qualified and no applicants with greater skills were hired into those positions by Respondent.

25 The discriminatees should be offered reinstatement and backpay should run from the date that jobs for which they were qualified were filled by Respondent. See pp. 15-17, 24-26, and 28 of my December 1, 1999 decision. Counsel for the General Counsel correctly points out in their brief on remand that I inadvertently left off the names of carpenter discriminatees Michael Victor and Terry Browning from my recommended order and notice. Accordingly I recommend the following amended

30 ORDER¹

Respondent, Tradesmen International, Inc., its officers, agents, successors, and assigns, shall:

35 1. Cease and desist from

(a) Unlawfully interrogating employees about their union membership.

40 (b) Discouraging employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members or supporters of unions.

(c) In any like or related manner interfering with, restraining, or coercing its employees or applicants for employment in the exercise of their Section 7 rights protected by the Act.

45 2. Take the following affirmative action deemed necessary to effectuate the purposes and policies of the Act:

¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rule, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(a) Within 14 days from the date of this Order, Tradesmen International, Inc., shall offer to the below listed individuals employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges:

Electricians

1. Kevin Balbo
2. Kevin Barnett
3. Dennis Becker
4. Michael Berg
5. Ed Brown
6. Robert Edwards
7. Dennis Egbert
8. David Henderson
9. John Kroupa
10. Mike Logan
11. Nathan "Pete" Love
12. Timothy Moist
13. Dwayne Shambaugh
14. George Silling
15. Carmen Voso
16. Neil Wilford

Carpenters

1. Tim Aldridge
2. Terry Browning
3. Cy Cicone
4. William Clopein
5. Tim Fleischmann
6. Mark Gerke
7. Randy Gerke
8. Joseph Kankowsky
9. Horace Pestridge
10. William Pestridge
11. Lee Rutherford
12. Ed Thuerrauch
13. Michael Victor
14. Robert Whye

(b) Respondent should make the individuals listed in paragraph 2(a) above whole for any loss of pay and other benefits suffered by them as a result of Respondent's discrimination against them. Backpay to be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Within 14 days after service by the Region Respondent shall post copies of the attached appropriate notice marked Appendix B.² Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by an authorized representative of Respondent shall be posted immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced or covered by any other material.

(e) Within 21 days after service by the Region, Respondent shall file with the Regional Director for Region 5, sworn certifications of a responsible official on a form provided by Region 5 attesting to the steps that each has taken to comply with this order.

Dated, Washington, D.C. January 12, 2001.

Martin J. Linsky
Administrative Law Judge

² If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX B

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT unlawfully interrogate employees about their union membership.

WE WILL NOT discourage employees from engaging in activities on behalf of a labor organization by refusing to hire job applicants because they are members or supporters of unions.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees or applicants for employment in the exercise of their Section 7 rights protected by the Act.

WE WILL offer to the below listed individuals employment in positions for which they applied, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges:

Electricians

1. Kevin Balbo
2. Kevin Barnett
3. Dennis Becker
4. Michael Berg
5. Ed Brown
6. Robert Edwards
7. Dennis Egbert
8. David Henderson
9. John Kroupa
10. Mike Logan
11. Nathan "Pete" Love
12. Timothy Moist
13. Dwayne Shambaugh
14. George Silling
15. Carmen Voso
16. Neil Wilford

Carpenters

1. Tim Aldridge
2. Terry Browning
3. Cy Cicone
4. William Clopein
5. Tim Fleischmann
6. Mark Gerke
7. Randy Gerke
8. Joseph Kankowsky
9. Horace Pestridge
10. William Pestridge
11. Lee Rutherford
12. Ed Thuerrauch
13. Michael Victor
14. Robert Whye

WE WILL make the above listed applicants whole for any loss of pay and other benefits as a result of our discrimination, with interest.

TRADESMEN INTERNATIONAL, INC.

(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered with any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 103 South Gay Street, 8th Floor, Baltimore, Maryland 21202-4061, Telephone 410-962-3113.